

THE HONOURABLE SRI BILAL NAZKI

THE ACTING CHIEF JUSTICE

AND

THE HONOURABLE SRI JUSTICE

R.SUBHASH REDDY

WRIT APPEAL No. 1912 OF 2005

Dated 11th November, 2005

Between:

M/s. Tirumala Music Centre (P) Ltd.,

represented by its Chairman and

Managing Director, N.Amarnath.

... Petitioner

And

Bharat Sanchar Nigam Limited, represented by

its General Manager (Marketing), CELLONE,

2nd Floor, C.T.O. Building, Secunderabad

and others. ... Respondents.

ORAL JUDGMENT:

(per Honourable Sri Justice R.Subhash Reddy)

This Writ Appeal is preferred under Clause 15 of the Letters Patent by the writ petitioner against the order passed by the learned Single Judge in Writ Petition

No.19474 of 2005 directing the petitioner-appellant to raise a dispute before the arbitrator by invoking clause 30 of the agreement.

The facts necessary for the disposal of this Writ Appeal are as follows:

The first respondent, Bharat Sanchar Nigam Limited (for short "BSNL"), a Government of India Enterprise, issued a tender notification for appointment of dealers for marketing and distribution of its Cellular Mobile Telephone Service (CMTS) for the territory of Malakpet, Hyderabad in Andhra Pradesh Telecom Circle. The appellant, a Private Limited Company, which is engaged in the business of trading in consumer electronics and home appliances in Hyderabad responded to the said notification and offered its bid, pursuant to which, appellant was appointed as dealer for Malakpet territory for distribution of "Cell One" Post-paid cellular mobile services and an agreement was entered into on 30.12.2002 between the appellant and Bharat Sanchar Nigam Limited, which is valid for a period of two years from the date of the commencement of the said agreement. As per the terms agreed, the appellant-company has furnished bank guarantee for a sum of Rs.5.00 lakhs and commenced its business. It is stated that during the course of business, about 1165 post-paid connections were activated on the basis of the subscribers' applications submitted by the appellant-company. But, the subscribers of the above Cell Services, whose connections were activated through the dealership of the appellant-company appears to have not paid usage charges. Therefore, notices were issued by the BSNL to the defaulted subscribers for recovery of the outstanding dues. But, the said notices were returned with the remarks "addressee not found" and investigation revealed that the subscribers were fake and manipulated, and on account of the same, the BSNL suffered a loss of Rs.57,59,800/- in the territory of Malakpet alone, and, therefore, the appellant-company is liable to pay the said amount. Therefore, demand notice impugned in the writ petition was issued demanding payment of Rs. 55,16,062.97 ps. within 15 days from the date of the receipt of the said notice, as the appellant company failed to recover the said amount from the subscribers, and failing which, the BSNL shall be constrained to recover the said amount after adjusting the performance Bank Guarantee submitted by the appellant-company.

Aggrieved by the said demand, the appellant-company filed the writ petition

contending that the appellant being the dealer has provided facility to the customers to avail services of Post Paid Cellular connections and if the user charges are not paid by the subscribers, it cannot be held responsible. It was its further case that the action of the BSNL is unilateral and also in violation of the Principles of Natural Justice. The writ petition was resisted by the BSNL by contending that having regard to the nature of the relief sought in the writ petition, the writ petition is not maintainable under Article 226 of the Constitution of India, as the demand for payment of the amount under the notice impugned in the writ petition arises out of the contractual obligations between the parties. It was the case of the BSNL that the encashment of the bank guarantee and the demand for payment of the amount stated in the notice are in accordance with the terms and conditions of the agreement entered into between the writ petitioner and the respondents, and, in case, if there is any dispute, the agreement itself provides for arbitration clause and the petitioner has to invoke the said clause and cannot approach this Court by filing the writ petition. Having considered the contentions of both the parties, learned Single Judge held that the demand raised by the BSNL is in accordance with the terms and conditions of the agreement and if the petitioner is aggrieved by the said demand, it is for the petitioner-company to raise a dispute before the arbitrator by invoking the arbitration under Clause 30 of the agreement entered into between the parties. Aggrieved thereby, the writ petitioner filed the present Appeal.

In the Writ Appeal, Sri V.Venkataramana, learned counsel for the appellant-petitioner submitted that even as per the terms and conditions of the agreement entered into between the appellant and the BSNL, it is not open for the BSNL to unilaterally assess the dues from the subscribers and demand the same from the appellant-company. It is his submission that, though there is a contract between the parties, but inasmuch as the very demand itself is contrary to the terms and conditions of the contract, the demand notice can be agitated before this Court in the writ petition filed under Article 226 of the Constitution of India. In support of his contention, he relied upon the judgments of the Supreme Court in **State of Karnataka v. Rameshwara Rice Mills, Thirthahalli, Harbanslal Sahnia v. Indian Oil Corpn. Ltd, and ABL International Ltd. v . Export Credit Guarantee Corpn. of India Ltd..**

On the other hand, the learned counsel appearing for the respondent-BSNL, Dr.Bhaskara Mohan, submits that as per the terms and conditions of the agreement

entered into, there was obligation on the part of the appellant-dealer to make all endeavours to ensure that no fraud of any kind of contractual, criminal or otherwise is committed by the subscribers in the matter of taking/providing Cellular Mobile Telecom Services and the dealer is responsible for the costs and consequences thereof. As such, it is submitted that it was the duty of the appellant dealer to verify the genuineness of the subscribers and their addresses by examining their bona fides for providing such services and in this case, many of the subscribers who have availed such facilities through the appellant-dealer have not paid the usage charges and when steps were taken by issuing necessary notices for recovery of the usage charges, it was found that the subscribers were not at all available in the addresses furnished in the applications. In that view of the matter, the amount defaulted by the subscribers is demanded from the appellant-dealer as per the terms and conditions of the agreement, and, the BSNL is entitled to encash the unconditional performance bank guarantee given by the appellant-dealer. The learned counsel for BSNL placed reliance on the very same judgment of the Supreme Court, on which the learned counsel for the appellant relied viz. **ABL International Ltd. v . Export Credit Guarantee Corpn. of India Ltd.** and also on another decision of the Supreme Court in **National Highway Authority of India v. M/s Ganga Enterprises.**

For considering the aforesaid contentions of the learned counsel for the parties, a scrutiny of few clauses in the agreement is necessary. It is not in dispute that pursuant to acceptance of the rates offered by the appellant-dealer, an agreement was entered into. Clause 21 which enables BSNL to encash the bank guarantee and clause 26.15 which contemplates costs and consequences in the event of any fraud read as follows:

“Clause 21 (1) Damages: In the event of termination of this agreement consequent upon breach of any of the terms of this agreement or surrender of dealership at its own will of the dealer, damages to the extent of loss determined by BSNL shall be recovered from the dealer in addition to the encashment of Performance Bank Guarantee.

(ii) Legal action: BSNL may initiate legal action against dealer in case of para 21(1) above.

(iii) BSNL may debar the dealer for future dealings with BSNL for any contract/dealership.

Clause 26.15: The Dealer shall make all endeavors to ensure that no fraud of any kind contractual, criminal or otherwise is committed by any prospective

subscribers in the matter of taking/providing CMTS connection and matters connected therewith and shall be responsible for the costs and consequences thereof.”

Also relevant is the clause pertaining to arbitration contained in Clause 30, which reads:

“Dispute Resolution/Arbitration:

Any question, dispute or differences arising out of or in connection with this agreement or breach, termination or validity hereof, shall be first endeavored to be settled through friendly discussion or negotiations between the parties. If the dispute cannot be amicably settled either party, as soon as practicable, but not earlier than three months after a request to settle the dispute amicably has been made to the other party, give to the other party note in writing or existence of such question, dispute or difference, specifying the nature and the point at issue, and the same shall be finally settled by Arbitration conducted in Hyderabad in accordance with The Arbitration and conciliation Act, 1996 any modifications or reenactments thereto and relevant laws and regulations in force at that time in India. All such disputes and differences which may arise between the parties hereto as to the meaning, construction or effect of any of the terms and provisions of this agreement or as to the right or claim of either party under this agreement shall be referred to the sole arbitration of the Chief General Manager Telecom, AP Circle, BSNL or his nominee including any officer of Bharat Sanchar Nigam Limited (BSNL) nominated by him and the Distributor shall not raise any objection to such arbitration on the ground that interested party or that the Arbitrator so appointed has either dealt with the subject matter of this agreement. Any order/Directions/Awards of the Arbitrator shall be final and binding on both the parties. The arbitration proceedings shall take place in Hyderabad and will be governed by the provisions of The Arbitration and Conciliation Act, 1996 or of any statutory amendment thereto or any reenactment thereof for the time being in force. The Arbitrator so appointed shall pass a speaking award. The Courts at Hyderabad shall have exclusive jurisdiction under this agreement.”

Though it is the case of the appellant-dealer that it is only a dealer by which it has to provide cellular services to the consumers and it is not liable for payment of any usage charges, but, as per Clause 26.15, it was obligatory on the part of the dealer to make all endeavours to ensure that no fraud of any kind of contractual, criminal or otherwise is committed by the prospective subscribers in the matter of taking/providing Cellular Mobile Telecom Services. From a conjoint reading of the said clause with other clauses extracted above, it reveals that a duty was cast upon

the dealer to verify the genuineness of the addresses given by the consumers, to whom, services were provided through the appellant dealer. It is the case of the BSNL that the usage charges were not paid and recovery steps taken proved futile, as the consumers were not available in the given addresses. In that view of the matter, it cannot be said that there is no loss on account of any lapse on the part of the appellant. By virtue of Clause 26.15, the BSNL is entitled to recover the said loss occasioned to it from the appellant dealer, as it was made responsible for the costs and consequences on account of fraud of any kind of contractual, criminal or otherwise in nature. Though the term “fraud” is not expressly mentioned in the demand, but the basis for the claim of the respondents is nothing short of a fraud by the consumers, for which, the appellant-dealer is responsible, as it is obligatory on its part to verify the genuineness of the addresses etc., and the appellant dealer was also liable for the demand raised. In such an event, it cannot be said that the demand is totally outside the scope of the contract, particularly, with reference to Clause 26.15. There is no adjudication of the claim, and, if the petitioner disputes his liability, there is a specific clause with regard to the arbitration. Merely because demand is raised against the appellant with a condition to enforce the bank guarantee, it will not tantamount to adjudication of the claim so far as the appellant is concerned. At this stage, the appellant is not entitled for any notice and it cannot be said that the demand raised is in violation of the Principles of Natural Justice.

Though reliance is placed by the learned counsel for the appellant on the decision in **State of Karnataka v. Rameshwara Rice Mills, Thirthahalli (1 supra)**, but, having regard to the terms and conditions in the contract in that case, the Apex Court has held that the terms of the contract will not empower the Government to adjudicate upon disputed question of breach as alleged.

In **ABL International Ltd. v . Export Credit Guarantee Corpn. of India Ltd. (3 supra)**, the Apex Court held that in appropriate case, the Writ Court has jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar in regard thereto. But, at the same time, in the very same case, it was held that a writ petition involving serious disputed questions of fact, which require consideration of evidence, which is not on record, will not normally be entertained under Article 226 of the Constitution of India.

In **Harbanslal Sahnia v. Indian Oil Corpn. Ltd (2 supra)**, the Apex Court held that the rule of exclusion of writ jurisdiction is of discretion and not one of

compulsion. In the said case, the Apex Court stated the contingencies in which the High Court may exercise its writ jurisdiction. But, in the judgment relied on by the learned counsel for BSNL in **National Highway Authority of India v. M/s Ganga Enterprises (4 supra)**, with regard to invocation of bank guarantee, the Supreme Court held as follows:

“There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an “on demand Bank guarantee” is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of Bank guarantee. The Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud, Courts cannot restrain invocation of an “on demand guarantee” in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract become irrelevant when the invocation is in terms of the Bank guarantee. The Bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The Bank guarantee was enforced before the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the Bank guarantee was against the terms of the Bank guarantee. If it was in terms of the Bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.”

However, in **ABL International Ltd. v . Export Credit Guarantee Corpn. of India Ltd. (3 supra)**, the Apex Court has considered the maintainability of writ petition with reference to cases where there is an arbitration clause in the contract and where there is no such clause.

Though there is no express bar for entertaining the petitions under Article 226 of the Constitution with regard to matters covered by contractual obligation, however, it is a matter, which has to be examined with reference to the facts of each case, terms and conditions of the agreement, nature of dispute etc.

Coming to the case on hand, Clause 26.15 of the agreement entered into between the parties in unequivocal terms stipulate that the dealer shall make all endeavor to ensure that no fraud of any kind, contractual, criminal or otherwise is committed by any prospective subscribers in the matter of taking/providing CMTS connection and matters connected therewith and shall be responsible for the costs and consequences thereof, whereby a duty is cast upon the appellant-dealer to

verify the genuineness of all the particulars stated by the consumers in the applications for connections including the addresses furnished by them for ensuring their payment for the usage of the Cellular Mobile Telephone Services provided through the appellant-dealer and now the dealer cannot be permitted to say that it is only a provider for such service and it is not liable for the payment of the usage charges by the consumers, as it is specifically stated in Clause 21 that upon breach of any of the terms of the agreement by the dealer, the damages/loss sustained and determined by BSNL shall be recovered from the dealer. If the demand raised by the BSNL is disputed by the appellant, it is always open for it to initiate appropriate proceedings for appointment of an arbitrator for adjudication of the dispute by invocation of Clause 30 of the agreement entered into between the parties, but, it is not open for the appellant, at this stage, to approach this Court questioning the demand raised by the BSNL, in a petition filed under Article 226 of the Constitution of India, on the ground that it is not liable for any claims raised by the BSNL. The cases cited by the learned counsel for the appellant are of no avail to appellant.

Coming to the question of encashment of bank guarantee, the bank guarantee furnished by the appellant-dealer is an unconditional one and can be encashed by BSNL upon breach of any of the terms of the agreement and the damages or loss sustained by BSNL can be recovered by such encashment. The same is evident from a conjoint reading of Clause 21 of the terms and conditions of the agreement entered into between the parties and the bank guarantee furnished by the appellant-dealer. Since the bank guarantee can be invoked in case of failure to observe or perform the terms and conditions of the agreement by the appellant-dealer without any objection or demur by the appellant and irrespective of the dispute with regard to the liability of the appellant-dealer the same cannot be said to be against the terms of the agreement.

For the foregoing discussion, we are in agreement with the conclusions arrived at by the learned Single Judge and do not find any ground to interfere with the same. Accordingly, this Writ Appeal is dismissed. However, it is left open to the parties to seek reference to the Arbitrator with regard to the disputes in accordance with the terms and conditions of the agreement, and, in case, such a reference is sought by any of the parties, it is open for the arbitrator to go into all the disputes raised de hors the observations made by this Court either in this Writ Appeal or in the writ petition on any of the aspects. No costs.

(BILAL NAZKI, ACJ.)

11--11-2005.

(R.SUBHASH REDDY, J.)

VR.